No. 02-1781

IN THE

Supreme Court of the United States

ROBERT L. JOSEPH,

Petitioner,

v.

SALT LAKE CITY CIVIL SERVICE COMMISSION, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE COURT OF APPEALS OF UTAH

BRIEF IN OPPOSITION

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Respondent, Salt Lake City Corporation (hereinafter "the City") files this brief in opposition to the Petition for Writ of Certiorari filed by Petitioner, Robert L. Joseph (hereinafter "Joseph").

OPINIONS BELOW

Course of Proceedings

Joseph appealed Police Chief Connole's decision to terminate his employment to the Salt Lake City Civil Service Commission ("the Commission") on April 5, 2000. (Pet. App. 19-23). On March 5, 2001, the City filed a Motion to Dismiss Appeal for Failure to Cooperate with Discovery. After repeated failure by Joseph to cooperate in discovery, on March 15, 2001, the parties presented to the Commission a Stipulated Motion to Continue Hearing that contained a representation by Joseph that he would produce *all* the discovery requested by the City by March 30, 2001. The Commission accepted the stipulated motion to continue the hearing but the Commission ordered that if the City did not receive all the discovery it had requested by the March 30 deadline, Joseph's case would be dismissed. After Joseph's failure or refusal to comply with the stipulation, on April 9, 2001, the Commission issued an Order of Dismissal. (Pet. App. 12-13). On April 23, 2001, the Commission issued an Order Denying Joseph's Motion to Strike Order of Dismissal. (Pet. App. 10-11).

Joseph appealed the Commission's decision to the Utah Court of Appeals. On July 26, 2002, the Court of Appeals issued a decision affirming the Commission's decision. (Pet. App. 3-9). That decision has been published and can be found at *Joseph v. Salt Lake City Corporation*,

2002 UT App 254, 53 P.3d 11. Joseph filed a Petition for Rehearing with the Court of Appeals. That Petition was denied. (Resp. App. 1). The Utah Supreme Court denied Joseph's Petition for Writ of Certiorari. (Resp. App. 2).

JURISDICTION

The issues raised by Joseph are insufficient to confer jurisdiction upon this Court and do not raise any significant federal issues that permit this Court to accept jurisdiction.

This Court, with "very rare exceptions," *Yee v. Escondido*, 503 U.S. 519, 533, 112 S. Ct. 1522, 1531, 118 L. Ed. 2d 153 (1992), "will not consider a petitioner's federal claim unless it was either addressed by, or properly presented to, the state court that rendered the decision." *Adams v. Robertson*, 520 U.S. 83, 86, 117 S. Ct. 1028, 137 L. Ed. 2d 203 (1997). Petitioner Joseph did not raise or present any federal claims or issues to the Utah courts below.

Rule 10 of the Rules of the Supreme Court reflects that a Petition for Writ of Certiorari will only be granted for "compelling reasons." Although Rule 10 lists three categories of consideration, none of the three questions raised by Joseph in his Petition fit within any of those categories. The City respectfully submits that Joseph has failed to present any compelling reasons sufficient to warrant the exercise of this Court's discretion to consider his Petition.

Joseph has also failed to meet his obligations under Rule 14.1(g) of the Rules of the Supreme Court. He must specify when the federal question sought to be reviewed was raised and the manner or method of raising the question so as to show that the federal question was timely and properly raised

such that this Court has jurisdiction to review the state court's judgment. The petitioner's burden has been described as the need to demonstrate that the petitioner presented the particular claim being raised in the Petition with "fair precision and in due time." *Adams*, 520 U.S. at 87, quoting *New York ex rel. Bryant v. Zimmerman*, 278 U.S. 63, 67, 495 S. Ct. 61, 63, 73 L. Ed. 184 (1928).

Joseph's Petition should be denied because he has failed to raise any federal questions or present compelling issues as to why his Petition should be granted.

STATEMENT OF THE CASE

Rule 24.2 of the Rules of the Supreme Court of the United States provides that a respondent's brief need not include a concise statement of the case unless the respondent is dissatisfied with the petitioner's presentation of the statement of the case. The Respondent City is dissatisfied with Joseph's statement of the case in large part because Joseph relies on information and documents to support arguments that were never made part of the record before the Civil Service Commission or Court of Appeals. Also, Joseph devotes most of his petition to reiterating his perception of the facts relating to the March 26, 1999 shooting incident that ultimately lead to a finding by the Chief of Police that Joseph violated two police policies and resulted in the imposition of a twenty-day suspension. That matter (hereinafter referred to as "the twenty-day suspension appeal") is not before this Court, having been fully adjudicated in favor of the City and culminating in this Court denying certiorari on April 21, 2003, No. 02-1211.

Nature of the Case

On July 16, 1999, Police Chief Ruben Ortega terminated Robert Joseph's employment with Salt Lake City Corporation because he felt that Joseph had violated the Police Department's deadly force policy and the policy that prohibited firing at or from a moving vehicle. These violations, coupled with Joseph's employment history, caused Chief Ortega to conclude that Joseph could no longer serve effectively as a Police Officer. Chief Ortega left office as Chief of Police on or about January 1, 2000.

On January 3, 2000, acting Chief A. M. "Mac" Connole reviewed all matters known to be relevant concerning Joseph's employment termination. Based upon this review, Chief Connole amended the City's decision and reinstated Joseph, subject to (1) the finding that Joseph's use of deadly force was not within police policies and (2) the imposition of a 20-day suspension without pay for the policy violations.

Chief Connole also required Joseph to submit to a fitness for duty examination with Dr. David McCann, a Utah psychiatrist. Joseph was deemed psychologically unfit to be a police officer by Dr. McCann. The Utah Court of Appeals, in its published decision upholding the Commission's dismissal of the termination appeal as a discovery sanction, quoted Dr. McCann's conclusion in *Joseph v. Salt Lake City Civil Service Commission*, 53 P.3d 11, 13-14 (Utah App. 2002):

> In March of 1999, Joseph was involved in an incident that resulted in the Salt Lake City Police Department (the City) determining that he had acted unprofessionally and had violated the City's

> deadly force policy. While this finding was later affirmed by the Commission, Joseph was permitted to continue his employment pending the results of a fitness for duty examination. Thus, Joseph was examined by Dr. David McCann, who, in March of 2000, submitted to the City the following conclusions regarding Joseph:
>
> [He] has Disordered Personality Traits which have contributed to him placing himself in jeopardy in the shooting incident and in other incidents. Officer Joseph's personality traits have caused him to be excessively self-centered and unwilling to learn from peers or superiors. His personality traits are likely to lead him to increased isolation and alienation from appropriate professional supervision and the needs of the citizens of Salt Lake City. Personality traits similar to those of Officer Joseph's are notably resistant to psychotherapeutic intervention, additional training, closer supervision or disciplinary action. His personality traits cause an increased risk for harm to himself, to other officers and to the citizens of Salt Lake City. In [Dr. McCann's] opinion, Officer Joseph is not psychologically suitable to perform the duties of a police officer.

Joseph's failure to pass the fitness for duty examination resulted in his termination from Salt Lake City Corporation on March 31, 2000.

Joseph appealed the termination to the Civil Service Commission on April 5, 2000 by filing a Request for Appeal Hearing with the Commission (hereinafter "the termination appeal"). (Pet. App. 19-23). Thereafter, Joseph refused to

cooperate with discovery, ignoring at least 7 written discovery requests. *Joseph*, 53 P.3d at 15. On April 9, 2001, the Civil Service Commission dismissed Joseph's appeal for failing to comply with the Commission's March 15, 2001 Order by failing to provide all of the discovery requested by Salt Lake City Corporation by the March 30, 2001 deadline established by the order of the Commission. (Pet. App. 12-13). Joseph filed a "Motion to Strike Order of Dismissal and to Allow Hearing to Go Forward" that the City opposed. After a hearing on that motion, the Commission issued an Order Denying Joseph's Motion to Strike Order of Dismissal on April 23, 2001. (Pet. App. 10-11).

REASONS FOR DENYING THE PETITION

A. The doctrine of *stare decisis* concerning an agency's interpretation and application of the law under the Utah Administrative Procedures Act ("UAPA") does not apply in this case.

The first question Joseph places before this Court is: "Did the Utah Court of Appeals follow *stare decisis* concerning interpretation and application of administrative law." According to Joseph, the Utah Court of Appeals erred in not interpreting and applying the law established under UAPA when it upheld the Salt Lake City Civil Service Commission's decision to dismiss Joseph's appeal as a discovery sanction. Joseph's analysis is unpersuasive because the UAPA does not apply to the Civil Service Commission, a municipal tribunal.

The Utah Court of Appeals, in *Lucas v. Murray City Civil Service Commission*, 949 P. 2d 746, 755 (Utah App. 1997), recognized that the Murray City Civil Service Commission

was "a local, municipal tribunal of limited jurisdiction." *Id.* As such, the court concluded that "[t]he Commission is neither a court of law nor a state administrative agency subject to the Utah Administrative Procedures Act (UAPA)." *See also Tolman v. Salt Lake County Attorney*, 818 P.2d 23 (Utah App. 1991) (UAPA applies only to administrative actions of state agencies and does not apply to local administrative bodies). Contrary to Joseph's statement on page 17 of his Petition, the Civil Service Commission is not controlled by the UAPA. Section 63-46b-2(1)(b) defines the term agency under the Act and excludes tribunals such as municipal Civil Service Commissions:

> **"Agency"** means a board, commission, department, division, officer, council, office, committee, bureau, or other administrative unit of this state, including the agency head, agency employees, or other persons action on behalf of or under the authority of the agency head, but **does not mean** the legislature, the courts, the governor, **any political subdivision of the state, or any administrative unit of a political subdivision of the state.**

(Emphasis added).

The Utah Court of Appeals correctly analyzed and applied the law appropriately in upholding the Civil Service Commission's dismissal of Joseph's appeal as a discovery sanction. The Utah Administrative Procedures Act does not control decisions made by the Civil Service Commission and the Utah Court of Appeals appropriately did not use the UAPA in its analysis.

B. Res judicata precludes the issues of qualified immunity and self defense to be raised in this matter.

Joseph was terminated for failing a fitness for duty evaluation that found him to be psychologically unfit to be a police officer. The Civil Service Commission dismissed Joseph's appeal of his employment termination as a discovery sanction for willfully refusing to cooperate with discovery. The issues of whether or not Joseph had acted in "self-defense" in the March 26, 1999 shooting incident or was justified in his actions were never at issue in Joseph's appeal of his employment termination. Rather, those issues were fully adjudicated in the twenty-day suspension appeal and those appeals are final.

Joseph asks this Court to declare that his acts on March 26, 1999 were "in self-defense" and justified and argues that all adversarial proceedings should have been barred as a result. Joseph had his opportunity to present the same theories to the Salt Lake Civil Service Commission in the twenty-day suspension appeal. The Civil Service Commission was not persuaded by the evidence that Joseph acted in self-defense or that his shooting was justified. Likewise, the Utah Court of Appeals was not convinced that the Commission abused its discretion by failing to weigh all the evidence. It concluded that Joseph violated the Department's deadly force policy and that his use of deadly force was unjustified and affirmed the Civil Service Commission's decision. Both the Utah Supreme Court and this Court have denied Joseph's Petitions for Writ of Certiorari. Thus, Joseph has fully pursued his arguments that he acted in self-defense and that he was justified in his actions and has lost each and every time. He is barred now from raising those issues in this Court when those issues were not ever raised in the termination appeal.

It is well recognized that "[r]es judicata, also called claim preclusion, precludes a party from relitigating issues that were or could have been raised in an earlier action, provided that the earlier action proceeded to a final judgment on the merits." *King v. Union Oil Co.*, 117 F.3d 443, 445 (10th Cir. 1997). The United States Supreme Court has recognized that res judicata principles apply to administrative proceedings:

> When an administrative agency is acting in a judicial capacity and resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate, the courts have not hesitated to apply res judicata to enforce repose.

University of Tennessee et al., v. Elliott, 478 U.S. 788, 797-98 (1986) quoting *Utah Construction & Mining Co.*, 384 U.S. 394, 421-22 (1966). The Court in *Elliott* opined:

> [G]iving preclusive effect to administrative fact-finding serves the value underlying general principles of collateral estoppel: enforcing repose. This value, which encompasses both the parties interest in avoiding the cost and vexation of repetitive litigation and the public's interest in conserving judicial resources is equally implicated whether fact-finding is cone by a federal or state agency.
>
> * * *
>
> Accordingly, we hold that when a state agency "acting in a judicial capacity . . . resolves disputed issues of fact properly before it which the parties

> have had an adequate opportunity to litigate," *Utah Construction & Mining Co.*, at 422, federal courts must give the agency's fact-finding the same preclusive effect to which it would be entitled in the State's courts.

Elliott, 478 U.S. at 798-99.

Here, Joseph wants this Court to declare that he was justified in shooting as he did and that he acted in self-defense, thereby triggering the qualified immunity defense, and would have this Court undo all the previous litigation and court rulings as if they never occurred because, as Joseph believes, the City should have been barred from seeking disciplinary action against him. The essential fact that Joseph refuses to accept is that he was disciplined for violating two police policies and that decision, in the twenty-day suspension appeal, was upheld by the Civil Service Commission and the Utah Court of Appeals. The Utah Supreme Court and this Court declined to revisit the matter.

The issues that Joseph was acting in self-defense and was therefore justified in shooting were not before the Civil Service Commission or any of the state appellate courts in the termination appeal, having been fully adjudicated in the twenty-day suspension appeal. Thus, they are not properly before this Court and do not present appropriate issues for review.

C. The Health Information Portability and Accountability Act ("HIPAA") does not apply to this case for a number of reasons.

Joseph's "HIPAA" argument is raised for the first time in his Petition to this Court. Although not properly before this Court, Joseph's newly presented argument regarding alleged HIPAA violations cannot be ignored, not only because of its factual inaccuracies but also because the law is simply contrary to Joseph's position.

1. Joseph Had No Expectation of Privacy

Joseph would have this Court believe that the City has released information which it knew was private and in which Joseph claimed a privacy interest. The facts reveal an opposite conclusion.

In other litigation prosecuted by Westley Scott, the individual shot by Joseph, the City retained independent counsel to represent Joseph. On August 14, 2000, the City's attorneys requested that all parties enter into a Stipulated Confidentiality Agreement and Protective Order regarding certain Police Department Internal Affairs files and psychological information regarding Joseph. Joseph attaches that request as Pet. App. 69 and suggests that, thereafter, the City and its attorney "did little to protect the information from wrongful disclosure to the public at large." (Petition at p. 14). What Joseph conveniently fails to add is that after receiving no response from Joseph or his attorney to the August 14, 2000 request, the City again requested their cooperation in obtaining a Protective Order. (Resp. App. 2) On January 25, 2001, the City received this response from Joseph's attorney – "This letter is to advise that Rob Joseph does not require a protective order." (Resp. App. 3)

From these exchanges, it is evident that (1) the City initiated and furthered the effort to obtain a protective order and (2) Joseph chose not to participate in such efforts. It is apparent that the City exhibited appropriate caution but Joseph declined such efforts. He should not now be heard to complain.

2. Joseph's Alleged Medical Information Was Not Released By Counsel

Joseph repeatedly alleges that counsel has and continues to wrongfully disclose Joseph's protected health information. That is not the case.

In the Civil Service Commission proceeding concerning the termination appeal, the City set forth Dr. McCann's conclusion in its Response to Joseph's appeal (Pet. App. 14-17). That conclusion was set forth verbatim in *Robert L. Joseph v. Salt Lake City Civil Service Commission*, 2002 UT App. 254 ¶ 2, 53 P.3d 11, 13-14. (Pet. App. 3-9). Recently, that same conclusion was set forth in an order issued by the Honorable Dale A. Kimball in Joseph's pending federal court RICO lawsuit against the City, its past and present Mayors and a host of police officials. (Resp. App. 4).

In the termination appeal proceedings, Joseph was represented by two separate, competent attorneys and, for a time, by himself, pro se. At no time did either attorney, on behalf of Joseph, or did Joseph as attorney pro se, seek to seal the City's Response to Joseph's Appeal, the only part of the record where any part of Dr. McCann's report appears. On appeal, the City was required to forward the Civil Service record to the Utah Court of Appeals, including the City's Response to the Civil Service Commission Appeal which

contained Dr. McCann's conclusion. Again, Joseph took no steps to seal such material until *after* the Court of Appeals issued its opinion. The Court declined Joseph's invitation to redact the quoted provision from its opinion.[1]

Clearly, the City did nothing but provide the official record to the Utah Court of Appeals after Joseph filed his appeal. The City cannot be faulted for doing what it is required to do.

3. HIPPA Is Inapplicable

In his HIPAA allegations, Joseph demonstrates a gross misunderstanding of the Act. The HIPPA provisions were not in effect at the relevant times. Joseph erroneously claims that the City released materials that are subject to HIPAA's privacy rules. In addition to the other reasons why such allegations are in error, the privacy rules did not go into effect until April 14, 2003. *See* 45 C.F.R. 164.534. Any alleged release certainly took place prior to that date and HIPAA's privacy rules did not pertain.

HIPAA does not apply to these circumstances. Joseph's allegation that the City violated the privacy rules of HIPAA is misguided. Such privacy rules apply only to "covered entities," i.e. health plans, health care clearing houses and health care providers who conduct financial and administrative transactions such as electronic billing. *See* 45 C.F.R. 160.10. While the City is not a "covered entity",

1. It is noted that the City did not refer to Dr. McCann's evaluation in its Brief before the Court of Appeals. The City simply stated that "on April 19, 2000, the City filed its response to the [Civil Service Commission] Appeal." The Court *sua sponte* searched the record for Dr. McCann's conclusion.

its health plan is subject to the privacy rules. However, no part of Joseph's City-administered health plan was made public, either before HIPAA or after. The fitness for duty evaluation performed by Dr. McCann was not administered through the City's health plan but, rather, for employment-qualification purposes.

Formal complaints for alleged privacy rules violations are filed with the privacy officer of the covered entity or with the Department of Health and Human Services. *See* 45 C.F.R. 160.306(a). The privacy rules are enforced by the Department's Office for Civil Rights. *See* 65 Fed. Reg. at 82472.

Joseph, contrary to these procedures, seeks to privately enforce the privacy rules. HIPAA does not provide a private cause of action. *Ass'n of American Physicians and Surgeons v. United States Dept. of Health and Human Services*, 224 F. Supp. 2d 1115, 1129 (Tex. 2002); *O'Donnell v. Blue Cross Blue Shield*, 173 F. Supp. 2d 1176 (Wyo. 2001); *Means v. The Independent Life and Accident Insurance Co.*, 963 F. Supp. 1131, 1135 (Ala. 1997); *Wright v. Combined Insurance Co.*, 959 F. Supp. 356, 363 (Miss. 1997).

This Court should not review Joseph's HIPPA argument.

D. Joseph was not denied due process of law.

Joseph contends in his Petition that he was denied due process of law because the Commission must provide him with nothing less than a "full and fair hearing." The Commission did not reach the merits of Joseph's claim because it dismissed his appeal as a discovery sanction. Thus, whether or not Joseph received a "full and fair hearing" is not before this Court.

Traditionally, the due process right to receive a full hearing before the Commission is not without limitation. Although courts recognize that a party must be given an opportunity to be heard, "dismissal with prejudice is appropriate when a party pursues a claim in a manner that abuses that opportunity." *Preston & Chambers v. Koller*, 943 P.2d 260, 263 n.2 (Utah App. 1997).

Joseph was asked for all of the discovery long before the March 30, 2001 deadline. Clearly, he had the requested items but chose not to produce them to the City. Joseph apparently believes that regardless of his willful disregard of the discovery process, he was still entitled to proceed to a hearing on the merits. The Court of Appeals rejected that argument:

> Joseph argues that the meaning behind "the opportunity to be heard, at a meaningful time and in a meaningful manner, (citation omitted) in this context, immunizes him from dismissal, regardless of his conduct. He is incorrect.[2]

Joseph v. Salt Lake Civil Service Comm'n, 53 P.3d at 15. The Court of Appeals correctly concluded that the "Commission did not violate Joseph's due process right to a post-deprivation hearing." *Id.* Thus, Joseph's argument is unavailing.

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2. In the opinion set forth in Joseph's Brief at App. 7, Joseph incorrectly quotes the Court of Appeals as stating "He is correct." The correct quotation is as set forth above, to wit "He is incorrect." *See, e.g., Joseph*, 53 P.3d at 15.

E. The Court of Appeal's decision is not in conflict with case law.

Joseph claims that the Court of Appeals' decision is in conflict with the decisions of *Lucas v. Murray City Civil Serv. Comm'n*, 949 P.2d 746 (Utah App. 1997) and *Vetterli v. Civil Serv. Comm'n*, 145 P.2d 792 (Utah 1944). A reading of the decision, however, reveals that it does not conflict with either of those cases. In *Vetterli*, the Court addressed the question of whether the Commission exceeded the scope of its authority when it set aside the Chief's order of discharge and substituted instead a six-month suspension. 145 P.2d at 794. In *Lucas*, the Court of Appeals set forth the two inquiries that the Civil Service Commission must make in reviewing disciplinary decisions. Neither the *Vetterli* nor the *Lucas* decisions dealt with the authority of the Commission to dismiss an appeal as a discovery sanction. As such, both cases are inapposite and do not create conflicts sufficient to support review by a writ of certiorari.

Rather, the Court of Appeals in Joseph based its decision on well-established law:

> When an administrative agency determines that a party has not complied with legitimate discovery requests due to "'willfulness, bad faith, . . . fault, or persistent dilatory tactics frustrating the judicial process,'" the agency acts within its discretion in imposing sanctions. *Hales v. Oldroyd*, 2000 UT App 75 ¶ 16, 999 P. 2d 588 (citation omitted). "'[T]he choice of an appropriate discovery sanction [including the entry of default against the noncomplying party] is primarily the responsibility of the [agency],'" and "we have long held that we

> will not interfere [with this choice] unless' "abuse of that discretion [is] clearly shown."'" *Morton v. Continental Baking Co.*, 938 P.2d 271, 274 (Utah 1997) (citations omitted) (fifth alteration in original).

Joseph, 53 P.3d at 15.

The Court of Appeal's conclusion that the Commission "had ample basis to justify sanctioning Joseph for his continued failure to comply with the City's discovery requests" (*Id.*) makes it clear that the Commission did not abuse its discretion in choosing to dismiss Joseph's appeal as a discovery sanction. Thus, the court's decision is not in conflict with other decisions on the same issue nor is the decision a departure from the accepted and usual course of judicial proceedings that would call for an exercise of this Court's supervision.

MISSTATEMENTS MADE IN JOSEPH'S PETITION

Pursuant to Rule 15.2 of the Rules of the Supreme Court of the United States, the City is compelled to point out the numerous misstatements made by Joseph in his Petition for Writ of Certiorari. In addition to the numerous misstatements identified above, the City has identified two categories under which the other misstatements and inaccuracies fit.

A. Joseph has altered a public document by changing the appeal number in order to cause the Court to believe that it was part of the record below.

Attached as Pet. App. 32-43 to Joseph's Petition is a document entitled "Memorandum in Support of Motion for Relief from Judgment." Joseph shows the appeal number of that pleading as Appeal No. 20010399-CA which is the appeal

number for the termination appeal. However, that document was never filed in the termination appeal. Rather, it was filed in the twenty-day suspension appeal, Appeal No. 20001111-CA. (Resp. App. 5). Joseph has altered the document by changing the appeal number from the twenty-day suspension appellate case in order to cause this Court to believe that it was part of the record in the termination appeal.

As further evidence that Joseph's alteration was deliberate is his representation at page 23 of his Petition that the City quoted Dr. McCann's conclusion "verbatim in the Utah Court of Appeals to oppose Officer Joseph's motion for relief of judgment. (Pet. App. 32)." A review of the City's opposition to Joseph's motion for relief (Resp. App. 5) did not refer to Dr. McCann's conclusion at all since the motion for relief of judgment (Pet. App. 32) was filed in the twenty-day suspension matter which did not deal with the fitness for duty evaluation, Dr. McCann's conclusion or Joseph's employment termination.

Joseph should not be allowed to alter the appeal number on a court document in order to give this Court the erroneous perception that the document was part of the record below when it was presented in another appeal entirely. Rule 14.4 of this Court's rules states that the "failure of a petitioner to present with accuracy . . . whatever is essential to ready and adequate understanding of the point requiring consideration is sufficient reason for the Court to deny a petition." Here, Joseph's alteration of the appeal number on the court document clearly presents an inaccurate representation of the record below and should be sufficient reason for this Court to deny his Petition[3].

3. This is not the first time that Joseph has engaged in this type of conduct. In an earlier Petition (No. 02-1211) before this Court, he misrepresented the date the Utah Supreme Court issued its Order (Cont'd)

B. Joseph misstates his case by relying on documents and things that were not part of the record.

The Court of Appeals issued an Order striking numerous documents from Joseph's addendum to his appellant's brief in the twenty-day suspension appeal.

Now in the appeal of his termination, Joseph has appended to his Petition documents that were stricken in the twenty-day suspension appeal and were never part of the record in the termination appeal. Those documents include Pet. App. 71-72 and 77-78.

In the termination appeal, Joseph filed with the Court of Appeals a Motion to Supplement the Record (Pet. App. 26-31) which was denied in its entirety (Resp. App. 7). Undaunted, Joseph nevertheless attaches documents to his Petition that the Court of Appeals refused to accept. Those documents include Pet. App. 55, 56-67, 60, and 61-62.

Joseph has appended numerous other documents to his Petition that were never part of the record in the termination appeal. Those documents include Pet. App. 18, 32-44, 63, 64, 65-66, 67-68, 69-70, 73-74, 75, 76, 79-82, 83-86, 87-92, and 93-94.

By presenting documents to this Court as if they were part of the record below, Joseph is knowingly presenting an

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(Cont'd)

denying Joseph's Petition for Writ of Certiorari, changing the date from November 12, 2002 to November 14, 2002. This misrepresentation caused it to appear that Joseph had filed his Petition in a timely fashion (i.e. 90 days from November 14, 2002) when, in actuality, his Petition was filed 92 days from the actual date, November 12, 2002.

inaccurate picture of the proceedings and issues. Joseph repeatedly violates Supreme Court Rule 14.4 throughout his Petition and, accordingly, this Court should deny Joseph's Petition.

CONCLUSION

Joseph's Petition is nothing more than one more effort to reargue, and even rewrite, the facts of his case. Despite the fact that this Court denied his Petition for Writ of Certiorari in the twenty-day suspension appeal, Joseph again raises many of the issues of that appeal as if they were part of the termination appeal. Joseph raises issues in his Petition that were never raised with the Civil Service Commission or the Utah courts and attempts to offer evidence that was never part of the record. Joseph's Petition is replete with misstatements and inaccuracies, including the alteration of a court pleading, justifying this Court's denial of Joseph's Petition.

For these reasons, the City respectfully requests that this Court deny Joseph's Petition for Writ of Certiorari.

Respectfully submitted,

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APPENDIX

RESP. APP. 1

IN THE UTAH COURT OF APPEALS

ORDER

Case No. 20010399-CA

Robert L. Joseph,

Petitioner,

v.

Salt Lake City Civil Service Commission
and Salt Lake City Corporation,
Police Department,

Respondents.

This matter is before the court upon appellant's petition for rehearing, filed August 12, 2002.

IT IS HEREBY ORDERED that the petition for rehearing is denied.

Dated this 16th day of September, 2002.

FOR THE COURT:

/s/
Judith M. Billings
Associate Presiding Judge

RESP. APP. 2

January 5, 2001

Roger H. Bullock
Strong & Hanni
9 Exchange Place #600
Salt Lake City, UT 84111

Re: *Scott v. Salt Lake City Corporation and Joseph*

Dear Roger:

On August 14, 2000, I wrote to you and Mr. Gooch concerning our request that the parties enter into a Stipulated Confidentiality Agreement that would result in a Protective Order. As I indicated in that letter, the City has numerous documents that may be relevant to the allegations, claims and defenses in the above case, including Internal Affairs files and psychological information concerning Mr. Joseph.[1] We feel that we are required to produce the information pursuant the Fed. R. Civ. P. 26 but had hoped to have the confidentiality agreement and the protective order in place prior to disclosure. I never heard from you as to whether you and Mr. Joseph would enter into the agreement and allow a Protective Order to issue.

Mr. Gooch has indicated that he will enter into the Stipulated Confidentiality Agreement and approve as to form the Protective Order. We, of course, are willing to do so as well. Certainly, the only way for the agreement and order to have any effect is to

1. Mr. Joseph has already received copies of these documents as part of the Civil Service appeals he has filed. His receipt of this information in the Civil Service matters does not obviate our duty to produce the documents in the instant matter.

have all parties bound by the agreement and order. Since much of the protection to be gained by the Stipulated Confidentiality Agreement and Protective Order will inure to Mr. Joseph, we trust that you and Mr. Joseph will also be willing to execute the documents and be bound by their terms.

I have enclosed the Stipulated Confidentiality Agreement and the Protective Order for your signature and Mr. Joseph's signature. If I do not hear from you or receive the enclosed documents bearing your signatures by January 12, 2001, I will assume that neither you nor Mr. Joseph feels a need to protect the confidentiality of the records and we will produce the documents without a confidentiality agreement or Protective Order in place.

I will rely on you to convey this information to Mr. Joseph in his capacity as both your client and as the counterclaimant pro se. I will not be communicating with him directly regarding the matters contained in this letter.

Thank you for your attention to this matter.

Very truly yours,

/s/
Martha S. Stonebrook
Assistant City Attorney

enclosures
cc: Steven W. Allred

RESP. APP. 3

January 25, 2001

Ms. Martha S. Stonebrook, Esq.
Salt Lake City Attorneys Office
451 South State Street, Room 505
Salt Lake City, Utah 84111

Re: Scott, Westley v. Joseph, Robert

Dear Martha:

This letter is to advise that Rob Joseph does not require a protective order.

Thank you for your cooperation.

Yours very truly,

/s/
STRONG & HANNI
Roger H. Bullock

RHB/kk

cc: Rob Joseph
Jeffrey D. Gooch
Kent W. Spence
John M. Chipman
D. Bruce Oliver

RESP. APP. 4

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH
CENTRAL DIVISION

ORDER

Case No. 2:000V340DAK

ROBERT JOSEPH,

Plaintiff,

vs.

SALT LAKE CITY CORPORATION, et al.,

Defendants.

This matter is before the court on (1) Defendant Utah Attorney General's Office's Motion to Dismiss Amended Complaint; (2) Utah Attorney General's Office's Motion to Strike; (3) Defendant Dick Shepherd's Motion to Dismiss; (4) Defendant Steve Bartlett's Motion to Dismiss; (5) Defendant Bartlett's Motion to Strike; (6) Plaintiff's Motion for Leave to Conduct Discovery; (7) Plaintiff's Motion for Sanctions for Attorney Misconduct; (8) Defendant Salt Lake City Defendants' Motion to Strike Motion for Sanctions for Attorney Misconduct and Motion for Relief; (9) Plaintiff's Motion for Summary Judgment Against Attorney General's Office; and (10) Plaintiffs Motion to File In Camera Plaintiffs Addenda Supporting Plaintiff's Motion for Summary Judgment Against the Attorney General.[1]

1. The last two motions listed (numbers 9 & 10) were not argued at the June 23, 2003 hearing but are ripe for decision by the court at this time.

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A hearing on the motions was held on June 23, 2003. At the hearing, Defendant Attorney General's Office was represented by Peter L. Rognlie and Peggy Stone; Defendants Dick Shepherd ("Shepherd") and Steve Bartlett ("Bartlett") were represented by T. J. Tsakalos; The Salt Lake City Defendants (the "City Defendants") were represented by Steven W. Allred and Martha S. Stonebrook; Plaintiff Robert Joseph ("Plaintiff') was represented by D. Bruce Oliver. Before the hearing, the court considered carefully the memoranda and other materials submitted by the parties. Since taking the motions under advisement, the court has further considered the law and facts relating to these motions. Now being fully advised, the court renders the following Order.

I. ATTORNEY GENERAL'S OFFICE'S MOTION TO DISMISS (#103) AND MOTION TO STRIKE (# 132)

The Attorney General's Office argues that it should be dismissed because, among other reasons, it is entitled to 11th Amendment Immunity and because it is not a "person" for purposes of 42 U.S.C. § 1983 and § 1985.

The court agrees that the Attorney General's Office must be dismissed from this action on the following grounds: (1) the Attorney General's Office is immune from suit in federal court, and Plaintiff has not demonstrated that the State has waived its 11th Amendment immunity, (2) the Attorney General's Office is not a "person" amenable to suit under § 1983; (3) Plaintiff has failed to state a claim because there is no § 1983 liability for violation of a state statute, (4) the state statute relied upon by Plaintiff is inapplicable to the facts at issue in this case; (5) *Ex Parte Young* does not apply to the claims against the

Utah Attorney General's Office because it is not a "state official" under *Ex Parte Young* and because Plaintiff does not seek the declaratory or prospective injunctive relief contemplated by *Ex Parte Young*.

Because the court has not relied on any of the attachments that the Attorney General's Office has moved to have stricken, the motion to strike is moot.

II. DEFENDANT DICK SHEPHERD'S MOTION TO DISMISS (#108)

The court finds that Defendant Dick Shepherd is entitled to dismissal from this action because (1) prosecutorial immunity is an absolute bar and precludes any of the claims against him; (2) Plaintiff's claims are barred by the doctrine of claim preclusion; (3) Plaintiff's claims are barred by the doctrine of issue preclusion; and (4) Plaintiff has failed to state a claim against him because the January 18, 2000 letter about which Plaintiff complains does not support any claim against him.

III. DEFENDANT STEVE BARTLETT'S MOTION TO DISMISS (#118) AND MOTION TO STRIKE (#142)

The court finds that the claims against Defendant Bartlett are dismissed because (1) the claims are barred by the doctrines of claim preclusion and issue preclusion, (2) Bartlett is entitled to prosecutorial immunity; and (3) even if he is not entitled to prosecutorial immunity, he is entitled to qualified immunity.

Because the court has not relied on Addendum C, E, H, or I in reaching its determination, it is not necessary for the court to decide whether to strike these documents from Plaintiff's Opposition Memorandum.

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IV. PLAINTIFF'S MOTION FOR LEAVE TO CONDUCT DISCOVERY (#137)

All parties submitted this motion for the court to decide based on the briefs. Under Rule 26(d) of the Federal Rules of Civil Procedure ("FRCP"), discovery is generally not permitted until the parties have conferred as required by FRCP 26(f). Plaintiff, however, seeks to conduct discovery prior to the Attorney's Planning Meeting. The court finds that there is no good cause for permitting discovery prior to the time frame set forth in FRCP 26(d).

V. PLAINTIFF'S MOTION FOR SANCTIONS FOR ATTORNEY MISCONDUCT (# 139) AND CITY DEFENDANTS' MOTION TO STRIKE MOTION FOR SANCTIONS FOR ATTORNEY MISCONDUCT AND MOTION FOR RELIEF (# 152)[2]

Salt Lake City Corporation (the "City') had previously retained Roger Bullock of Strong & Hanni to represent Mr. Joseph in Wesley Scott's action against Plaintiff Joseph and the City. The Agreement between the City and Mr. Bullock provides that "all documents and records produced by the Attorney in connection with this Agreement shall become and remain the property of the City," unless contrary to the attorney-client privilege. It also provides that, at the completion

2. The Attorney General's Office has joined in the City's request that this court impose relief to deter Plaintiff s future efforts to hams, annoy, vex, and embarrass. The Attorney General's Office points out that it has previously called the court's attention to Plaintiff's ad hominem attacks on other counsel to embarrass or harass them. Additionally, Defendants Bartlett and Shepherd also join in this portion of the City Defendants' motion.

of the services under the Agreement, all such documents, data, and records shall, at the option of the City, be arranged, indexed, and delivered to the City.

On or about September 16, 2002, the City Defendants filed a motion to stay the instant proceedings until the court had ruled on Plaintiff s Motion to Amend Complaint. This court granted the stay on September 23, 2002. Apparently prior to receiving the court's Order, Plaintiff had issued a subpoena to Mr. Bullock for his billing and correspondence files. Mr. Bullock notified Ms. Stonebrook that he had received the subpoena, and Ms. Stonebrook prepared a motion to quash the subpoena, based upon this court's Order staying all proceedings. The court granted Ms. Stonebrook's motion. Pursuant to the Agreement between the City and Mr. Bullock, the City requested delivery of all documents in the *Scott v. Joseph* case. Mr. Bullock complied.

A. Plaintiff's Arguments

Plaintiff seeks $50,000 in sanctions against Ms. Stonebrook and/or the City for violating the local rules regarding honesty and fidelity, obstruction of justice pursuant to 18 U.S.C. § 1512 (b) (witness tampering and using intimidation to corruptly persuade another to withhold documents or testimony), and Utah Rule of Professional Conduct 8.4(a) and (d) (inducement of another to engage in misconduct and engaging in conduct that is prejudicial to the administration of justice). Plaintiff also claims that the motion is based on violations of the 1st and 14th Amendments to the United States Constitution. He contends that the integrity of the files is "forever destroyed." He also claims that he should be able to present this conduct to the jury as part of its "pattern of racketeering activities," for purposes of Plaintiff s RICO claims against Defendants.

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B. The City Defendants' Arguments

In response, the City Defendants request that this court strike Plaintiff's Motion for Sanctions because of its conclusory and baseless, scandalous assertions against Ms. Stonebrook, and they request that this court craft some remedy to prevent the uncivil way in which Plaintiff and his counsel have litigated this case.

The City Defendants first set forth a brief history of Joseph's termination, which is at the heart of the instant lawsuit. The following history is set forth in an opinion from the Utah Court of Appeals in *Joseph v. Salt Lake City Civil Service Commission*, 2002 UT App. 254 ¶ 2, 53 P.3d 11:

> In March of 1999, Joseph was involved in an incident that resulted in the Salt Lake City Police Department (the City) determining that he had acted unprofessionally and had violated the City's deadly force policy. While this finding was later affirmed by the Commission, Joseph was permitted to continue his employment pending the results of a fitness for duty examination. Thus, Joseph was examined by Dr. David McCann, who in March of 2000 submitted to the City the following conclusions regarding Joseph:
>
> > [He] has Disordered Personality Traits which have contributed to him placing himself in jeopardy in the shooting incident and other incidents. His personality traits have caused him to be excessively self-centered and

> unwilling to learn from peers or superiors. His personality traits are likely to lead him to increased isolation and alienation from appropriate professional supervision and the needs of the citizens of Salt Lake City. Personality traits similar to those of Officer Joseph's are notably resistant to psychotherapeutic intervention, additional training, closer supervision, or disciplinary action. His personality traits cause an increased risk for harm to himself, to other officers and to the citizens of Salt Lake City. In [Dr. McCann's] opinion, Officer Joseph is not psychologically suitable to perform the duties of a police officer.[3]

Based at least in part on this evaluation, the City's Chief of Police, Mac Connole, terminated Joseph's employment. The Utah Court of Appeals upheld the Civil Service Commission's determination, and the Utah Supreme Court denied certiorari. Plaintiff has apparently filed a petition for certiorari with the United States Supreme Court.

The City Defendants claim that, as a result of this termination, Plaintiff has engaged in a relentless barrage of judicial, administrative, and public efforts to punish the City, its employees, and others who he perceives to have waged a secret and

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3. The fact that Mr. Allred repeated this language from the Utah Court of Appeals' opinion becomes the basis (in Plaintiff s reply memo) for Plaintiff s unreasonable assertion that Mr. Allred has now engaged in criminal conduct and should be sanctioned $250,000.

conspiratorial attack on him. The City Defendants cite several examples of Plaintiffs practice of name-calling, allegations of criminal and professional misconduct, and a general uncivil diatribe in his various litigations involving the City's attorneys.

The City Defendants argue that the litany of invectives should be stricken pursuant to FRCP 12(f) as "immaterial, impertinent, or scandalous." They argue that Plaintiff s conclusory assertions of criminal and unprofessional conduct regarding Ms. Stonebrook do not support Plaintiffs position. They highlight the fact that Plaintiff has never made a request for documents to the City. Further, the City Defendants point out that Plaintiff seeks to use this conduct as evidence of a RICO violation, but of the eight individual claims for RICO violations, none is asserted against the City. They seek to have all the conclusory statements regarding Ms. Stonebrook stricken as scandalous and as sullying the professional reputation of Ms. Stonebrook.

The City Defendants contend that aside from the scandalous and unmitigated personal attacks on Ms. Stonebrook, Plaintiff s counsel demonstrates an "unfortunate display of misinformation at best, or fabrication at worst." They claim that Ms. Stonebrook has done nothing to destroy the evidence, and in fact, the file is in the same form and condition as it was when delivered to her.

The City Defendants also point out that, while Plaintiff asserts in his motion a violation of 18 U.S.C. § 1512(b) (witness tampering), he does not appear to have alleged such a claim in his Amended Complaint. Further, he has not alleged that Mr. Bullock withheld testimony or changed his testimony or tampered with evidence. Thus, there are no facts to support a § 1512(b) claim.

Finally, the City Defendants appeal to the court for some relief from past and future harassment by Plaintiff. They ask that the court consider relief under FRCP 11, 28 USC § 1927, or such other inherent powers of the court.

C. Plaintiff's Response to the City Defendants' Motion

As a perfect demonstration of the vexatious and ever-moving target with which the City Defendants (and other Defendants) have had to contend in this litigation, Plaintiff claims in his reply memorandum that Plaintiff had a right to privacy concerning his personal and sensitive health information, i.e., his psychological exam by Dr. McCann. He argues that the City Defendants have continually failed to recognize this, and now the Utah Court of Appeals has quoted from this allegedly sensitive health information. Plaintiff now contends that such disclosure by the City Defendants is a violation of HIPAA. He claims that HIPAA criminalizes knowing and willful disclosures of identifiable health information and that Mr. Allred, in the City's Motion to Strike, has made "absurd and outlandish derogatory claims against Officer Joseph." Plaintiff claims that Mr. Allred has now engaged in criminal wrongdoing himself in defending Ms. Stonebrook's criminal conduct because Mr. Allred has "attempted to purport to this court that Officer Joseph is crazy and harassing Ms. Stonebrook." According to Plaintiff, Mr. Allred has also committed another crime by willfully and knowingly disclosing Mr. Joseph's health information to the court in a public record. Accordingly, Plaintiff requests that this court find that probable cause exists that Mr. Allred has violated Mr. Joseph's privacy with malicious harm and refer the matter to the United States Attorney's Office for screening for criminal charges. He claims that, if found guilty, Mr. Allred could be fined up to $250,000 and/or imprisoned for up to 10 years. Plaintiff also seeks $250,000 in sanctions against Mr. Allred for this wrongful disclosure.

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D. City Defendants' Reply

The City Defendants appropriately point out that Plaintiff failed to respond to their motion to strike and for other relief, and improperly brought up an entirely new argument about HIPAA violations, which was never mentioned before in Plaintiff's Motion for Sanctions for Attorney Misconduct.

The City Defendants also point out that Plaintiff has also included a "Statement of Facts" that is comprised of unsupported conclusions and allegations. They explain that they have not disclosed any information to which Plaintiff had an expectation of privacy. They also note that in the litigation between Wesley Scott and Mr. Joseph, the City requested that all parties enter into a Stipulated Confidentiality Agreement and Protective Order regarding various internal affairs files and psychological information pertaining to Joseph. Joseph's counsel declined and stated in a letter that "Rob Joseph does not require a protective order." In Plaintiffs Civil Service Commission proceedings, Plaintiff was represented by two separate, competent attorneys, and at no time did either one seek to seal Dr. McCann's evaluation. On appeal, the City was required to forward the Civil Service record to the Utah Court of Appeals, including the City's response to the appeal, which contained Dr. McCann's conclusion.[4] Again, Plaintiff took no action to seal such material until after the Court of Appeals issued its opinion. The Court of Appeals declined Plaintiff's invitation to redact the quoted provision from its opinion.

4. The City Defendants point out that they did not refer to his evaluation in their brief, rather it stated that "on April 19, 2000, the City filed its response to the [Civil Service Commission] Appeal. The Court of Appeal, sua sponte searched the record for Dr. McCann's conclusion.

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In addition to Plaintiff s failure to protect any health information that he wanted to keep private, the City Defendants contend that they could not be liable for disclosure in any event because HIPAA is inapplicable for a variety of reasons. (1) HIPAA's privacy rules were not in effect at the relevant times (the relevant portion of HIPAA did not go into effect until April 2003); (2) HIPAA does not apply in these circumstances because the City is not a "covered entity" and no part of its City-administered health plan was made public. The fitness for duty evaluation was not administered through the City's health plan, but for employment-qualification purposes; and (3) HIPAA does not provide a private cause of action.

E. Discussion

The City Defendants' Motions to Strike Motion for Sanctions for Attorney Misconduct and Motion for Relief is granted, and Plaintiffs Motion for Sanctions for Attorney Misconduct is hereby stricken. The documents requested from Mr. Bullock were the property of the City and were properly given to the City by Mr. Bullock. Plaintiff has not made a request for the documents from the City (nor could such a request be made until the appropriate time under FRCP 26(d)). Contrary to Plaintiffs counsel's sensational assertions, the court finds that there is no evidence indicating that there was anything nefarious about the conduct of the City Defendants' counsel relating to this incident. Further, the court is deeply troubled by the baseless and scurrilous allegations of criminal and professional misconduct asserted by Plaintiff s counsel against both Ms. Stonebrook and Mr. Allred in the instant motion and by Plaintiffs counsel's routine practice of including in his pleadings ad hominem attacks and/or allegations or criminal or professional misconduct regarding opposing

counsel or their clients. Plaintiff and/or his counsel have generally not conducted this litigation with an appropriate level of civility toward opposing counsel and their clients.

In addition, Plaintiffs counsel has made this complex litigation more burdensome than it needs to be by including significant amounts of scandalous and impertinent materials in virtually all of his filings, by naming defendants that clearly should never have been named, by bringing claims that are entirely unsupported, by asserting new claims in virtually every new filing, and by filing entirely unreasonable motions that consume the valuable resources of the court and opposing counsel and their clients.

The court, therefore, is compelled to take some action to prevent such vexatious litigation tactics from continuing in this three-year-old litigation. Pursuant to 28 U.S.C. § 1927[5], FRCP 11, FRCP 16(f), and the inherent powers of the court, this court hereby admonishes Plaintiff and his counsel that further unreasonable and vexatious conduct will not be tolerated. Upon motion by any Defendant, or upon the court's own motion, Plaintiff and his counsel will be responsible for any attorneys' fees incurred by Defendants in responding to any such unreasonable and/or vexatious conduct. Moreover, any further

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5. This statute provides:

> **Counsel's liability for excessive costs.**
>
> Any attorney or other person admitted to conduct cases in any court of the United States . . . who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct.

filings by Plaintiff that contain accusations of criminal or unprofessional conduct—or any other ad hominem attacks against counsel or their clients-that are made without concrete supporting facts and direct legal support will be stricken from the record upon motion *by* a relevant Defendant or on the court's own motion, and Plaintiff's counsel will be fined. Plaintiff and his counsel are also hereby notified that the failure to put an end to the uncivil nature of this litigation could result in dismissal of the entire action.

VI. PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AGAINST THE ATTORNEY GENERAL'S OFFICE (#146) AND PLAINTIFF'S MOTION TO FILE IN CAMERA PLAINTIFF'S ADDENDA SUPPORTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AGAINST THE ATTORNEY GENERAL (#148)

Because the court has dismissed the Attorney General's Office as a Defendant in this action, Plaintiff s Motion for Summary Judgment Against the Attorney General's Office and Plaintiff s Motion to File In Camera Plaintiff s Addenda Supporting Plaintiff's Motion for Summary Judgment Against the Attorney General are denied as moot.[6]

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6. Plaintiff sent a letter to this court on July 7, 2003, regarding "Notice of Default and Request for Ruling" on Plaintiffs Motion for Summary Judgment Against the Attorney General's Office. Plaintiff indicated in the letter that the Attorney General's Office had until June 23, 2003 to respond, but had failed to do so. However, on May 23, 2003, the court granted the Attorney General's Office's motion for an enlargement of time, and permitted the Attorney General's Office to delay its response to Plaintiffs Motion for Summary Judgment until 30 days after the ruling on the its Motion to Dismiss. *See* Order dated May 23, 2003.

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VII. CONCLUSION

For the foregoing reasons, IT IS HEREBY ORDERED that:

(1) Defendant Utah Attorney General's Office's Motion to Dismiss Amended Complaint (docket #103) is GRANTED, and the Attorney General's Office is DISMISSED as a Defendant in this action;

(2) Utah Attorney General's Office's Motion to Strike (docket #132) is DENIED AS MOOT;

(3) Defendant Dick Shepherd's Motion to Dismiss (docket #108) is GRANTED, and Mr. Shepherd is DISMISSED as a Defendant in this action;

(4) Defendant Steve Bartlett's Motion to Dismiss (docket #118) is GRANTED, and Mr. Bartlett is DISMISSED as a Defendant in this action;

(5) Defendant Bartlett's Motion to Strike (docket #142) is DENIED AS MOOT;

(6) Plaintiff s Motion for Leave to Conduct Discovery (docket #137) is DENIED;

(7) Plaintiff's Motion for Sanctions for Attorney Misconduct (docket #139) is STRICKEN;

(8) The City Defendants' Motion to Strike Motion for Sanctions for Attorney Misconduct and Motion for Relief (docket #152) is GRANTED, as are Defendants Bartlett and Shepherd's

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Joinder in the Motion for Relief (docket #161) and the Attorney General's Office's joinder in the Motion for Relief (docket #189). As stated above, Plaintiff s Motion for Sanctions for Attorney Misconduct is STRICKEN, and Plaintiff is admonished that further uncivil conduct could result in pleadings being stricken, monetary sanctions being imposed, and/or dismissal of the action, as set forth above;

(9) Plaintiff's Motion for Summary Judgment Against Attorney General's Office (docket # 146) is DENIED AS MOOT; and

(10) Plaintiff s Motion to File In Camera Plaintiff s Addenda Supporting Plaintiff s Motion for Summary Judgment Against the Attorney General (docket # 148) is DENIED AS MOOT.

DATED this 17th day of July, 2003.

BY THE COURT:

/s/
DALE A. KIMBALL
United States District Judge

RESP. APP. 5

Robert L. Joseph
Plaintiff, Pro-Se
1156 East Lost Eden Dr.
Sandy, Utah 84094
Telephone: (801) 571-3098

IN THE UTAH COURT OF APPEALS

STATE OF UTAH

MEMORANDUM IN SUPPORT
OF MOTION FOR RELIEF FROM
JUDGEMENT

Appeal No. *20001111-CA*
Priority No. (14)

ROBERT JOSEPH,

Petitioner,

vs.

SALT LAKE CITY CIVIL SERVICE COMMISSION,
AND SALT LAKE CITY CORPORATION,
POLICE DEPARTMENT, AND
THE CHIEF OF POLICE,

Respondents.

COMES NOW the Petitioner, Robert L. Joseph, Pro-se, pursuant to Rule 23 (a) of the Utah Rules of Appellate Procedure, hereby submits the following Memorandum in Support of Motion

for Relief from Judgement. This Court must grant immediate relief and impose severe sanctions against the City who have, with deliberate indifference to Officer Joseph's civil rights, purported a fraud upon the Court. The City has blatantly misrepresented the facts to this Court in an effort to deceive the Court and deny Officer Joseph due process. The City has conveniently changed it's testimony to serve their own interests and meet the needs of the case at hand. It is one thing to actively put on a defense, it is another to knowingly deceive, obstruct justice, or present evidence that they know to be false, and yet purport it to be the truth before the court. This with the intent to benefit themselves or another, while deliberately depriving another of his rights. Furthermore, the City in so doing, have actively conspired to obstruct justice and deprive Officer Joseph of his civil rights in violation of 42 U.S.C. § 1985 and 42 U.S.C.§ 1983. This Court should review the materials and make a determination based on the merits.

ARGUMENT

I.
THE CITY IS DELIBERATELY DECEPTIVE AND MISLEADING.

In this matter "The City" presented a case before the Commission that was not supported by substantial evidence. In fact, the City failed to bare the burden of proof or produce any physical evidence to support their fictitious and deliberately deceptive claims, that Officer Joseph shot at Scott from a standing position as Scott was fleeing the scene, and that Scott posed no threat to Joseph's life. (R 053 at 143-4).

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Statements made by Salt Lake City Detective Mendez were in direct conflict with the physical evidence derived from the State Crime Lab and the subsequent investigation as presented to the Commission by Ballistic Expert Edward Barton and Accident Reconstructionist, David Lord. David Lord and Edward Barton, through an analysis of the physical evidence and the State Crime Lab reports concluded that Officer Joseph commenced shooting while traveling backwards on Scott's car, then continued to shoot as he was propelled or "dumped" from the car, and also shot while lying on the ground and still in danger of being run over. (R. 054 at 451-462; 054 at 545-546).

In making it's final determination and Order, the "Commission" ultimately relied on the unsubstantiated testimony of Salt Lake City Detective Jerry Mendez, and upon hearsay testimony Chief Mac Connole and Chief William Shelton, who by their own admission, did not participate in the investigation or look at the physical evidence. (R. 054 at 252-253; 346-347).

Ms. Stonebrook then argued the City's position before the Commission as if it were based on fact supported by the physical evidence, when in fact, Ms. Stonebrook knew it to be to the contrary. (See Exhibit's I & II, Affidavit's of Judge Ernie Jones, prepared by "THE CITY.")

Salt Lake Civil Service Commission Hearing Testimony.

Detective Jason Snow.

Salt Lake City Police Detective Jason Snow testified before the Commission that he assisted the State Crime Lab in their evaluation of the shot trajectories and concluded that the shots

were fired from "low to high," the highest bullet strike being 36 inches above the ground. (R 053 at 89-92). Snow's testimony was in direct conflict with that of Detective Mendez who produced no physical evidence to support his claims, that Officer Joseph fired all his shots from a standing position, "on the move" as Scott was fleeing the scene and no longer posed a threat.

Detective Jerry Mendez

Salt Lake City Police Detective Jerry Mendez testified before the Commission that based on his experience, that Officer Joseph shot from a standing position and was on the move, taking steps as he shot at Scott's vehicle. Mendez presented no physical evidence to support his flawed theories, and in fact, testified that he didn't know how fast the car was traveling, and used terms such as " Maybe" and "Probably" to substantiate his claims. Mendez testified to the following before the Civil Service Commission, examination by Bruce Reading:

Q. According to your analysis over your years of experience, how far did Officer Joseph move while he was shooting at this vehicle?

A I would say you mean front/back, side-to-side?

Q. Any direction?

A. Side, I would say probably three to five feet. Forward, maybe four to five feet.

Q. How fast does that car accelerate, do you know?

A. No, I do not.

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Q. If we're talking movement of that distance how long do you think it would take Officer Joseph to move that distance following that position?

A. I don't understand.

Q. My concern is this: You are saying he moved quite a bit?

A. Yes.

Q. Firing as he was moving?

A. Yes.

Q. The car is accelerating away, according to your theory?

A. Yes.

Q. The further the car goes, the lower he has to be to shoot, to make these strikes?

A. Okay.

Q. My question is: How was he moving according to you? Was he running or crawling, what was he doing?

A. He was moving by steps. You can cover three feet real quick by one step.

(R 053 at 143-144).

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Chief William Shelton

Salt Lake City Assistant Police Chief William Shelton testified before the Commission that he had no involvement in Officer Joseph's investigation and simply relied on an alleged eye witness who did not participate in the hearings, and what was reported to him by City investigators. Shelton even acknowledged that eye witnesses can sometimes be mistaken. Once again, no physical evidence was presented to support any of the City's claims. Shelton testified before the Commission to the following under examination by Bruce Reading:

Q. All right. If for some reason Officer Mendez and Officer Mendez' testimony is this, that the window was shot out as the vehicle was driving away from Rob Joseph. That was one of his issues. If that was an error, would that have influenced your decision in anyway that in fact the window was broken while the vehicle was coming in reverse towards Rob Joseph?

A. There was 11 rounds fired in total which is a lot of rounds, first off. In all honesty, I was more concerned with the fact that they saw Rob Joseph standing in the street firing and saw nobody else around.

Q. Have witnesses occasionally been mistaken?

A. Oh, absolutely.

Q. And if the evidence of the bullet strikes simply would not support that analysis or testimony by a witness, would that be important to you in your decision whether Mr. Joseph was out of policy?

A. It would be ridiculous for me to say I wouldn't put any stock in listening to that kind of information. Of course, that would be silly not to. But again like I say, you need to look at everything, not just a single element or single piece of evidence.

(R. 054 at 275-276).

Chief Mac Connole

Salt Lake City Acting Police Chief Mac Connole testified before the Commission that he did not look at the physical evidence and simply relied on statements and reports from investigators in making his determination. Connole testified before the Commission under examination by Bruce Reading:

Q. I think you mentioned, Chief, on your direct testimony, that one of your concerns was that Officer Joseph was shooting at this vehicle as it was driving on 7th East away from the officer?

A. Yes.

Q. Did you take a look at the physical evidence of the bullet strikes to determine whether that was true?

A. No, I relied on the information I obtained from the Internal Affairs investigator and the homicide investigators.

Q. In fact, that's why you have those investigators out there, you have to rely on them?

A. Yes.

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Q. If it has been determined or if it is determined that that investigation was flawed, that in fact the shots could not have been fired at the vehicle as it was traveling away from Officer Joseph, down 7th East, would that have changed your decision in anyway?

(R.054 at 346-347).

Chief Connole, after failing to answer the last question, also testified before the Commission that the physical evidence gathered by the County and City supported his conclusion. Chief Connole's testimony is particularly disturbing in that the City's did not present any physical evidence to the Commission from the County and City investigations. Chief Connole Civil Service Commission examination by Bruce Reading:

Q. If you find that that evidence is not accurate, in other words, that that is not the facts, would that have changed your attitude at all about the shooting being out of policy?

A. Can we discuss it? Q. Sure. Absolutely. A. I think that when I came to this conclusion that you need to look at the county attorney has an investigator there, we have a homicide investigator there, and completely independent of those two we have an Internal Affairs investigator there. All of them said that there was inconsistencies with what Officer Joseph said occurred and what they found as evidence to their investigation.

Q. Would you put higher priority on the physical evidence or the testimony of individuals?

A. Well, I'm saying that they used physical evidence in their investigation. I know you are going to bring expert witnesses in. And that's fine. If you can prove it beyond a reasonable doubt, that's good too. But the information that I had and the evidence that I had is the reason that I decided the way I did.

(R. 054 at 348-349).

Ms. Martha Stonebrook

Ms. Stonebrook and the City's witnesses maliciously fabricated a case void of the truth or material fact. The City's case lacked any evidence. That is, it was based totally on a fictional and deliberately bifurcated and misleading accounts of the facts, that only went to serve their own interests at the expense of Officer Joseph's due process rights. Steve Allred, Ms. Stonebrook, Chief Connole, Chief Shelton and Detective Mendez produced no physical evidence to support their false claims that Officer Joseph fired all his shots from a standing position, "on the move" as Scott was fleeing the scene and no longer posed a threat. Ms. Stonebrook attempted to convince the Commission that the investigations conducted by the County and the City concluded one thing, when she knew full well that the facts did not support their position. In so doing, the City has deliberately and maliciously purported a fraud of the most egregious kind. The City has attempted to convey facts to this Court that they know not to be the truth. The City even attempted to put before the Commission and this Court fabricated facts about the District Attorney's conclusions and basis for dismissal of the criminal charges against Officer Joseph. Officer Joseph previously attempted to put before the Court in his Addenda

accompanying his Brief, documents and evidence known to the City to refute their false claims and impeach their testimony. The City objected to those Addenda claiming that they were not part of the official record:

> "It is well recognized that an appellate court's review is "limited to the evidence contained in the record on appeal." *State v. Pliego*, 1999 UT 8, ¶ 7, 974 P.2d 279, (holding that an appellant's addendum may not consist of evidence that is outside the record on appeal). (See Brief of Respondents).

The City's actions were specifically intended to deprive Officer Joseph of his due process and other State and Federal Constitutional Rights. Mr. Allred and Ms. Stonebrook, as it will be evident to this Court after a review of Exhibits I&II have indeed purported a fraud upon this Court. The following Affidavits were prepared by the City to be used in other matters involving Officer Joseph and were intended to deprive him of reimbursement of legal costs in the matter of the *State of Utah v. Robert L. Joseph.*

The Petitioner, Officer Joseph, respectfully submits to this Court that Ms. Stonebrook and the City have blatantly misrepresented the facts before the Commission and this Court in violation of Title 42 U.S.C. § 1983 and are guilty of conspiracy to obstruct justice in violation of Title 42 U.S.C. § 1985(2). This Court should not let the City get away with its deception by presenting FICTION. The Petitioner, Officer Joseph respectfully pleas to this Court for immediate relief from judgement and requests that the Court consider the evidence attached in support of his Motion for Relief from Judgement:

Appendix 5

EXHIBIT I
FIRST AFFIDAVIT OF JUDGE ERNIE JONES

The City prepared an Affidavit for the Honorable Judge Ernie Jones in the matter of Loni F. Deland and Robert Leon Joseph v. Salt Lake City Corporation, in the Third District Court Salt Lake County, State of Utah. The City prepared and submitted to the court the sworn statements of Judge Jones about the facts that lead to the dismissal of Officer Joseph's criminal case. These facts are the truth, and are in direct conflict with the City's position before the Commission and this Court. The City, in submitting these Affidavit's before the Third District Court swear them to be the truth. What this Court should find particularly disturbing about this first Affidavit is that it is dated April 6, 2001.. The City's Brief to this court was filed on November 6, 2001. At the time the City submitted their Brief, Ms. Stonebrook knew or reasonably should have known that the evidence and testimony presented by the City to the Commission and subsequently to this Court was fragrantly false. The following pertinent part, is taken from the sworn testimony prepared and submitted by the City to the Third District Court:

> 10. The State crime lab performed a laser reconstruction of the bullet strikes from officer Joseph's weapon on the vehicle. The laser reconstruction showed the shots were fired while Officer Joseph was sitting or lying on the ground. The trajectory was "low-to-high" in angle.
>
> 11. The results of this reconstruction appeared to contradict that State's earlier theory which was that Officer Joseph was standing up when he fired at the victim's vehicle.

Appendix 5

EXHIBIT II
SECOND AFFIDAVIT OF JUDGE ERNIE JONES

The City prepared a second Affidavit for the Honorable Judge Ernie Jones in the matter of Loni F. Deland and Robert Leon Joseph u Salt Lake City Corporation, in the Third District Court Salt Lake County, State of Utah on April 17, 2002. Once again, the City prepared and submitted to the court a sworn Affidavit by Judge Jones, that the City knows to accurately reflect the facts or evidence of Officer Joseph's case. In light of this Affidavit it should be obvious to this Court that the City is guilty of misconduct and purporting a fraud upon this Court. This Affidavit reads, in pertinent part:

> 9. I have also reviewed the report prepared by the State Crime Lab showing that the bullet trajectories were slightly upward direct, that is, from "low-to-high" as I had previously testified. A copy of that report is attached hereto.
>
> 10. I have also reviewed copies of photographs of the laser tests and the dowel and rod test that I also reviewed as part of my decision to dismiss the charges against Mr. DeLand's client. These photographs led me to conclude that the shots fired were from "low-to-high" and that the state's earlier analysis that Officer Joseph was standing when he fired the shots was incorrect.
>
> 11. From these tests and photographs, I concluded that it was more likely than not that Officer Joseph was either falling down or was on the ground

and that such facts were not inconsistent with his statement. Accordingly, I determined, after consultation with a review committee of prosecutors, to dismiss the charges against Mr. DeLand's client.

EXHIBIT III
SUPPORTING DOCUMENTS AVAILABLE TO THE CITY.

A. District Attorney Memorandum Dated November 18, 1999.

The City had this memorandum prior to the filing of their Brief and yet they still moved forward with misrepresenting the facts to this Court and failed to present the facts objectively. The memorandum in its entirety is clearly in conflict with the City's analysis of the incident and their claims about the evidence derived from the District Attorney's investigation and conclusions.

The following pertinent parts speak specifically to the issue of whether or not Officer Joseph was standing or "on the move" when the shots were fired:

> Tests completed by the State Crime Lab show the angle of the shots fired into Mr. Scotts vehicle were from "low to high." This analysis suggests that shots were fired while the officer was on the ground and in danger of being run over by the vehicle. While the injuries to Wesley Scott were serious it appears that Mr. Scott created the situation which caused these injuries.

Appendix 5

Officer Joseph was justified in shooting Wesley Scott because of the threat of being run over or injured by Mr. Scott's vehicle.

Also Officer Joseph was justified in using deadly force to effect the arrest and preventing the escape of Mr. Scott after the assault was committed.

B. Motion to Dismiss, State's Response and Order of Dismissal.

Assistant District Attorney Prosecutor Ernie Jones was assigned Officer Joseph's criminal case. Mr. Jones was presented with all the erroneous and fabricated facts and evidence generated by Salt Lake City Police Detective Jerry Mendez. Mr. Jones, after being confronted by the facts adduced at Officer Joseph's preliminary hearing, as well as evidence based upon expert reconstruction and upon further review of the State's peace officer use of deadly force statute, concluded that the evidence did not support the original theories as presented by Detective Mendez and other investigators. Upon a motion by attorney Mr. Loni Deland, the case against Officer Joseph was dismissed "with prejudice."

Appendix 5

II.

THIS COURT SHOULD, IN THE ALTERNATIVE, REMAND THE CASE BACK TO THE CIVIL SERVICE COMMISSION FOR AN EVIDENTIARY HEARING IN LIGHT OF THE CITY'S MISCONDUCT.

The Utah Court of Appeals has reasoned in *State of Utah v. Sixteen Thousand Dollars*, 914 P.2d 1176 (1996), "[A] party asserting error must first present the issue to the trial court through post judgement motion prior to seeking appellate review." Then, the Court went on to clarify, "Again, the proper course for an aggrieved party to follow would be to make a Rule 60(b) motion for relief from judgement, see Utah R Civ. P. 60(b)(7) (allowing a motion to be made on the basis of "any other reason justifying relief from the operation of the judgement"), or a motion for a new trial, or amend the judgement, pursuant to Rule 59. See Utah R Civ. P. 59(a)(5),(a)(6), (a)(7) (indicating that excessive damages, such a motion) ..... Id Consistent with that, the court explained, "A trial court should be given an opportunity to correct errors of law, as well as to excuse a defaulting party when reasonable, so as to resolve any arising controversy before appeal." Id (citations omitted).

The concept of allowing the trial court, or in this particular case, [The Civil Service Commission] an opportunity to correct it's error is long standing and should be consistent with the Petitioner's Motion in the Alternative. The Petitioner did originally file a Motion for Reconsideration with the Civil Service Commission on August 1, 2000. The Commission denied the motion on December 6, 2000 supporting the City's argument that the Petitioner's filing of a Petition for Review with this Court divests the Commission of jurisdiction.

Appendix 5

In light of the City's deliberately deceptive conduct, the Court in the Alternative should grant the Petitioner leave or remand the case back to the Commission for a new hearing in the interest of justice and allow the Commission to correct it's errors and perfect the record so that they may issue an objective finding from the truth.

CONCLUSION

This Court should be outraged and offended by the conduct and pattern of abuse by the City in this matter. The City was deliberately deceptive and misleading in presenting facts before the Commission and subsequently to this Court that they knew to be false. This Court should conclude after a review of the evidence that the City did willfully purport a fraud upon the Court, and did so, with the malicious intent to obstruct justice and deprive the Petitioner of his due process rights.

The Petitioner respectfully requests: 1) that this Court grant his Motion for Relief from Judgement; 2) set aside the Commission's Findings of Fact, Conclusions, and Order; 3) order the City to reimburse the twenty day suspension with interest; 4) and award legal costs and reasonable attorney's fees in conjunction with the matter before the Civil Service and this Court.

In the Alternative, the Petitioner requests, in the interest of justice, that the case be remanded back to the Commission for an evidentiary hearing. The Petitioner further pleas in the Alternative, that in light of the City's misconduct and deception, that they also be ordered to pay legal costs and reasonable attorney's fees accrued to this point.

Appendix 5

Dated 25th of June, 2002

/s/

Robert L. Joseph, Petitioner Pro-se

RESP. APP. 6

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MARTHA S. STONEBROOK, #5149
Assistant City Attorney
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IN THE UTAH COURT OF APPEALS

STATE OF UTAH

MOTION TO STRIKE PETITIONER'S MOTION FOR RELIEF FROM JUDGMENT OR ALTERNATIVELY REPLY MEMORANDUM IN OPPOSITION TO MOTION FOR RELIEF FROM JUDGMENT

Case No. 20001111-CA
Priority No. 14

ROBERT L. JOSEPH,

Petitioner,

vs.

SALT LAKE CITY CIVIL SERVICE COMMISSION, SALT LAKE CITY CORPORATION, SALT LAKE CITY POLICE DEPARTMENT, and the CHIEF OF POLICE,

Respondents.

Appendix 6

BACKGROUND

On January 3, 2000, the Salt Lake City Police Chief suspended Petitioner for 20 days after Petitioner was found to be in violation of City policy. Petitioner was found to have violated policy after he pulled over a vehicle for a traffic stop, that vehicle attempted to flee, and Petitioner fired eleven shots at the suspect, striking him once in the face and once in the foot.

Petitioner appealed the suspension to the Salt Lake City Civil Service Commission. After two days of hearing, during which the City called 8 witnesses and submitted 15 exhibits, the Commission unanimously found that the Chief's decision was supported by the evidence.

Petitioner appeals that decision to this Court. Petitioner filed his opening Brief, to which Respondents replied. Petitioner did not file a Reply Brief. Respondents were advised that this matter would be decided without oral argument. The matter is currently under consideration by this Court.[1]

On June 25, 2002, Petitioner filed this subject Motion.

---

1. Petitioner has another appeal from a subsequent decision of the Civil Service Commission (#20010399) dismissing his appeal for failing to cooperate with discovery. The Civil Service Commission appeal was as a result of being terminated after the Chief of Police found, based upon an independent psychological examination that Petitioner was unfit for duty as a police officer.

Appendix 6

ARGUMENT

I.

PETITIONER'S MOTION SHOULD BE STRICKEN

A.

THE MOTION IS IMMATERIAL

Petitioner's almost singular focus, in his Motion, is that there may have been a factual dispute regarding his relative position at the time he fired eleven rounds at a moving vehicle. Such dispute, while perhaps of some relevance in a criminal proceeding, is of no moment in a Civil Service Commission disciplinary proceeding.

The question before the Commission, and now this Court, was simply if the evidence sustained a finding that Petitioner violated City policies.

The Commission made no findings regarding the subject matter of Petitioner's Motion and limited itself to the following Conclusions:

1. Joseph engaged in unprofessional conduct that put himself in a position of danger.

2. Joseph used deadly force after all threat to him had passed.

3. Joseph shot at Scott's vehicle as it was moving away from him.

Appendix 6

4. Joseph violated Police Policy 3-06-02.00 (Deadly Force).

5. Joseph violated Police Policy 3-06-05.02 (Firing at or from a Moving Vehicle). (R. 051-052; see also Addendum 3, Brief of Respondents.)

Those Conclusions were based, *inter alia*, on a *stipulated* fact that Petitioner "fired eleven rounds, two of which hit Scott (one in the cheek and one in the foot)." (See Statement of Undisputed Facts, R. 042-045; R. 053:8 and Addendum 4, Brief of Respondent.)

The Commission also found, based upon *stipulated* facts, that Petitioner pulled his vehicle in front of Scott's car at an angle; did not call dispatch when he initiated the traffic stop; exited his vehicle and approached the Scott vehicle, ultimately opening the driver's side door – all of which resulted in Petitioner's unnecessarily placing himself in danger. (See Addendum 4, Brief of Respondent; R. 042-045.)

In addition, the Commission further found: "Joseph fired at least two shots at Scott's vehicle as the vehicle was moving away from him" and that two eye witnesses provided corroborative evidence. (See also R. 049-050; Addendum 3, Respondent's Brief.)

Even Petitioner's own testimony confirms the Commission's Findings. He testified that he fired his service weapon as he came up off the ground. (R. 054:393.) He testified that his vision was blurry and that he could not focus on the weapon's front sight nor could he focus on the Scott vehicle at which he was firing. (R. 054:393.)

Appendix 6

A review of the balance of the Commission's Findings of Fact and Conclusions makes it clear that not only was there ample evidence submitted to support the Commission's Order, but that the issues attempted to be raised by the current Motion are wholly extraneous and immaterial to the considerations of this matter.

B.

THE MOTION IS IMPERTINENT

Petitioner's Motion assails the ethics of counsel and others claiming that they engaged in "malicious fabrication" of "fictional and deliberately bifurcated and misleading accounts" and that counsel has "deliberately and maliciously purported a fraud of the most egregious kind."

Petitioner's calumnious remarks are not supported by anything greater than his own ill-perceived outrage. They have no tendency to make any fact material to these proceedings any more or less probable and appear to be little more than a trial run at allegations intended for other litigation.[2]

This Court should not welcome nor sanction such conduct and should strike such impertinent statements from the record in this matter.

---

2. Petitioner has previously filed an action pursuant to 42 U.S.C. § 1983 against the City and some of its officers. He has recently, through his counsel, advised the city that he intends to amend such action to include, *inter alia*, a claim for conspiracy.

Appendix 6

C.

THE MOTION SHOULD BE STRICKEN AS UNTIMELY

Petitioner's Motion, in addition to its other fatal flaws, is untimely. Petitioner had the opportunity to raise such matters in his opening Brief. He did not. He had the opportunity to file a Reply Brief. He did not.

Petitioner's appeal is currently before the Court and is under advisement. Had Petitioner deemed the matters in his Motion relevant, he had both the ability and the opportunity to present them in a timely manner. Failing to do so, Petitioner should be precluded from submitting such materials at this late date.

ALTERNATIVE ARGUMENT IN REPLY TO PETITIONER'S MOTION FOR RELIEF FROM JUDGMENT

As an alternative to Respondent's Motion to Strike, *supra*, Respondents submit the Petitioner's Motion for Relief is meritless. As set forth in Respondent's Brief, which is adopted herein by reference, the Commission's Order is well-supported by not only stipulated facts and independent witnesses but by Petitioner's own testimony.

Petitioner's Motion should be dismissed.

DATED this 9th day of July, 2002.

Appendix 6

/s/
STEVEN W. ALLRED
Acting City Attorney
Attorney for Respondents

RESP. APP. 7

IN THE UTAH COURT OF APPEALS

ORDER

Case No. 20010399-CA

Robert L. Joseph,

Petitioner,

v.

Salt Lake City Civil Service Commission and
Salt Lake City Corporation, Police Department,

Respondents.

This case is before the court on a Motion to Supplement the Record. The motion is opposed by respondents on the grounds that petitioner seeks to introduce evidence that was not before the Commission in connection with its dismissal of petitioner's appeal.

Petitioner does not demonstrate that the materials were a part of the record before the Commission. The materials pertain to the merits of the appeal of his termination; however, the appeal was dismissed on procedural grounds without consideration of the merits. This court's review is limited to only those issues pertaining to whether the appeal was properly dismissed. It is well-settled that this court's review is limited to the evidence actually presented to the commission. See, e.g., Kelly v. Salt Lake City Civil Service Com'n, 2000 UT App 235, 115, 8 P.3d

1048; see also Utah Code Ann § 10-3-1012.5 (1999) (limiting judicial review to the record of the commission). Based upon the foregoing,

IT IS HEREBY ORDERED that the motion to supplement the record is denied in its entirety, and

IT IS FURTHER ORDERED that petitioner's brief shall be filed on or before September 17, 2001.

DATED this 14th day of August, 2001.

FOR THE COURT:
Russell W. Bench, Judge